

**COURT OF APPEALS
DECISION
DATED AND FILED**

DECEMBER 23, 1997

**Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin**

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-2237-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE SUPPORT OF JOSHUA J.Z.:

STATE OF WISCONSIN,

PETITIONER-APPELLANT,

**WASHBURN COUNTY DEPARTMENT OF SOCIAL
SERVICES,**

CO-PETITIONER,

V.

PHILLIP C.P.,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Washburn County:
WARREN WINTON, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. This is an appeal of a judgment modifying Phillip C. P.'s child support obligations from \$205 to \$100 per month based upon a change in economic circumstances.¹ The appellant argues that the trial court misapplied § 767.32(2m), STATS., by failing to make the requisite finding of unfairness in order to justify its departure from the percentage standards governing child support obligations. Phillip argues that the appellant's argument is frivolous and asks for costs and fees under § 809.25(3), STATS. Although we reject the appellant's argument, we conclude that it is not frivolous. The judgment is affirmed.

The underlying facts are undisputed. Phillip has been paying \$205 per month child support pursuant to a court order for the support of his oldest child, Joshua J. Z.² Phillip, who works forty hours a week, recently suffered an income reduction from \$9.39 to \$6 per hour. The percentage standards enacted pursuant to § 49.22(9), STATS., require Phillip to pay 17% of his gross income as support, amounting to \$175 per month.

Phillip pays \$72 per month for insurance for his three children. His monthly house payment is \$248, his lot rental is \$173 and his utilities average between \$90 and \$100. He also has a \$250-per-month car payment. Food expense ranges between \$150 and \$250 per month, and his heating bill is \$70 per month. Because Phillip had increased insurance costs, would have to drive further to his new job, and had reduced income, the trial court found that the application

¹ This is an expedited appeal under RULE 809.17, STATS.

² \$25 of the \$205 was applied to his arrearage.

of the percentage standards created a "hardship" for Phillip. The court ordered that child support for Joshua be reduced to \$100 per month.

Modification of child support is committed to the discretion of the trial court. *Beaupre v. Airriess*, 208 Wis.2d 238, 243, 560 N.W.2d 285, 287 (Ct. App. 1997). We affirm a discretionary decision if the trial court examined the relevant facts, applied the correct legal standard and reached a rational decision. *State v. Gudenschwager*, 191 Wis.2d 431, 440, 529 N.W.2d 225, 229 (1995). "[I]f an exercise of discretion is based upon an error of law, the circuit court has acted beyond the limits of its discretion and its decision will not stand." *Cameron v. Cameron*, 209 Wis.2d 88, 99, 562 N.W.2d 126, 130 (1997).

The appellant argues that the trial court applied the wrong legal standard. It contends that § 767.32, STATS., which governs the revision of child support orders, requires a finding of unfairness to justify a departure from the percentage standards. It asserts that the court's finding of "hardship" is not synonymous with "unfairness." Phillip responds that the factors to be considered are found in § 767.25, STATS., and that "[t]he statute further states that the court may consider the guidelines." Phillip contends that the appellant is playing word games and requests that we assess costs and fees against the appellant pursuant to § 809.25(3), STATS.

For the following reasons, we conclude that Phillip's statutory analysis is erroneous. The appellant correctly interprets § 767.32, STATS., to apply to motions to revise child support orders and to require a finding of "unfairness" in order to permit the court to deviate from the percentage standards. Although the appellant's appeal approaches the frivolous, it does not cross the line. As a result, we conclude that the appeal is not frivolous.

Nonetheless, the trial court's use of the term "hardship," while not technically correct, when read in the context of its opinion, can be interpreted to mean that the strict application of the percentage standards would be unfair to Phillip. Because the court's terminology is not reversible error, we affirm the trial court, but for reasons other than those offered by the respondent.

The issue raised presents a question of statutory interpretation, a question of law we review de novo. *State v. Michels*, 141 Wis.2d 81, 87, 414 N.W.2d 311, 313 (Ct. App. 1987). The primary source of interpretation is the statutory language itself. *Hartlaub v. Coachmen Indus., Inc.*, 143 Wis.2d 791, 797, 422 N.W.2d 869, 871 (Ct. App. 1988). Section 767.32(1), STATS., provides that after a judgment or order providing for child support, the court may revise such judgment upon a finding of a substantial change in circumstances. After it makes this threshold finding, if the trial court revises a judgment or order with respect to child support payments, it shall do so using the percentage standards established by the department. Section 767.32(2), STATS.

However, an exception exists to the application of the percentage standards. "Upon request by a party, the court may modify the amount of revised child support payments determined under sub.(2) if, after considering the factors listed in s. 767.25(1m) or 767.51(5), as appropriate, the court finds, by the greater weight of the credible evidence, that the use of the percentage standard is unfair to

the child or to any of the parties." Section 767.32(2m), STATS.³ The finding of unfairness is dependent on consideration of several factors, including the financial resources of the parents and the needs of each party to support himself at or above a subsistence level. Section 767.25(1m)(b) and (bp), STATS.

The trial court examined the relevant factors and determined that the application of the percentage standards resulted in a "hardship" to Phillip. We agree with the appellant that "hardship" is not the correct test, nor is the term synonymous with unfairness. The hardship created by a support order may not necessarily be unfair. Here, however, the court not only found hardship, it examined the relevant factors and articulated its reasoning. This permits us to review the basis for its determination. The court observed that Phillip's income, at \$6 per hour, was substantially reduced and, at the same time, his traveling and insurance costs have increased. Taken in context, the record shows that the court was concerned with leaving Phillip no more than a subsistence income. This is an appropriate consideration. Because the court examined the appropriate factors, and reached a reasoned result, we do not view its imprecise terminology as a reversible error.

³ Another exception to the use of percentage standards is found in § 767.32(2r), STATS., which provides that if the court revises certain child support orders entered under ch. 48 or ch. 938, "the court shall determine child support in the manner provided in s. 46.10(14)," STATS. Section 46.10(14) applies to liability of a person for inpatient care and maintenance of juveniles at correctional facilities. It too provides that if after considering certain factors, "the court finds by the greater weight of the credible evidence that the use of the percentage standard is unfair to the child or to either of the parents" the court may modify the amount determined by use of the percentage standards. Section 46.10(14)(c), STATS.

The record indicates that Joshua is a resident of a juvenile correctional facility. However, because neither party refers to § 767.32(2r) or § 46.10(14), STATS., in their appellate briefs and, in any event, both § 767.32(2) and § 46.10(14)(c), STATS., refer to a finding of unfairness in order to deviate from percentage standards, our analysis will focus on § 767.32(2).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

